

## **STATE'S RESPONSE TO DEFENDANT'S "MOTION TO EXCLUDE IRRELEVANT TESTIMONY"**

The State can present testimony about the defendant's drug use in the context of a vehicular manslaughter/aggravated assault/endangerment case because such evidence is relevant to show the defendant's "extreme indifference to human life."

Comes now the State of Arizona, by and through undersigned counsel, and asks this Court to deny the defendant's "Motion to Exclude Irrelevant Testimony" pursuant to Rule 16.1(b), Ariz. R. Crim. P. Trial in this matter has been scheduled for November 6, 1995; therefore, the motion is untimely.

In the alternative, the State requests this Court to dismiss the defendant's motion because the defendant has failed to comply with Rule 35.1, by omitting the required brief memorandum stating the specific factual grounds for the motion. In the alternative, the State responds to and opposes the motion on the grounds and for the reasons set forth in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **STATEMENT OF FACTS**

On March 31, 1995, at 06:05 am, defendant Dale Slack was driving a stolen blue pickup truck westbound on Glendale Avenue when he ran a red traffic signal at 43rd Avenue. He collided with a southbound vehicle and caused the death of Terry Ross, a passenger in a white Plymouth, who was pronounced dead at the scene. Dale Slack then ran from the scene and was apprehended by witnesses. Slack was transported to John C. Lincoln Hospital for treatment of facial lacerations. The driver of the white Plymouth, James Potts, was treated for a fractured left pelvis, fractured right jaw, and a closed head injury. Slack was released from the hospital the next day, April 1, 1995.

Slack stole the truck from 3725 West State, where the owner had left the vehicle running to warm up. The owner went inside his residence and when he returned to the driveway, the truck was gone. The owner got into another of his vehicles, a red Geo, and drove off to search for his stolen truck. He first located his truck at Glendale and 35th Avenue, where he flashed his headlights and honked his horn in attempt to catch the driver's attention. As they turned on 39th Avenue, the truck came to a sudden stop, backed up, and struck the Geo. The truck then pulled forward slightly, went into reverse, and struck the Geo a second time. The truck then continued northbound on 39th Avenue.

Witnesses state that Slack's vehicle and the red Geo went around in circles at the intersection of 39th Avenue and Glendale Avenue, and then the truck fled westbound on Glendale Avenue at approximately 50-55 mph. The pickup was reported to be swerving from the curb lane to the center lane at this speed with its headlights off. When the pickup truck was approximately 100 feet east of the intersection of 43rd Avenue, a witness observed the traffic light for northbound/southbound travel turn green. The Plymouth, in the inside lane of southbound 43rd Avenue, entered the intersection. Slack, after failing to yield to the red traffic signal, drove the pickup into the Plymouth.

As soon as the pickup came to rest, Slack immediately got out of the pickup and fled on foot. Several witnesses at the scene gave chase and apprehended Slack as Slack attempted to climb over a chain link fence in the 4400 block of West Lamar. The witnesses held Slack until Officer Babinchak of the Glendale Police Department arrived at that location. Officer Babinchak placed handcuffs on Slack and placed him in the rear

of his marked police unit. Phoenix Police Department Officer Bennett then arrived and both officers transported Slack to a Denny's parking lot. At the parking lot, Slack was removed from the Glendale police unit, searched, and handcuffed again. Officer Bennett observed that Slack had a cut above his lip and several of his teeth were knocked out. Officer Bennett inquired if Slack was OK and what type of injuries he had. Slack failed to respond. Officer Bennett could not smell any odor of alcohol on Slack's breath.

Slack appeared to be aware of what Officer Bennett was doing, because Slack became upset when Officer Bennett tried to remove a chain that was around his neck. Slack told Officer Bennett several times to pull the chain over his head, but each time the officer tried to do so the chain caught on Slack's lip and was very painful. When Officer Bennett told Slack that the chain would have to be taken apart, Slack became upset and resistant. After Slack calmed down and Officer Bennett removed the chain, Officer Bennett observed bleeding from the rear of Slack's head. The paramedics transported Slack to the hospital. During Officer Bennett's contact with Slack, Slack made no comments or statements about what had occurred. Slack appeared disoriented and dazed, and had slurred speech with very poor balance.

At the hospital, Officer Burgess arrived and contacted Slack while he was being treated. Slack was conscious and speaking, although his sentences were incomplete and difficult to follow. Officer Burgess read Slack his *Miranda* rights per the standard *Miranda* card, to which Slack responded, "Yeah," meaning that he understood his rights. Officer Burgess did not advise Slack that he was under arrest or what charges he might face. Officer Burgess then asked Slack if he knew what happened. Slack responded, "I remember being chased," "I was paranoid," "They were trying to kill me," "I've been

Mirandized, is the officer still here?" Officer Burgess replied yes and Slack asked if the driver had been caught. Officer Burgess stated that she didn't know.

After Slack was x-rayed, Officer Burgess asked him if he remembered anything else. He replied, "I was standing by a pole, then, pow!" He said, "I might have hurt someone, I'm worried," "I remember the truck was blue and white, and I went to the bathroom in Denny's." Officer Burgess then said that Slack proceeded to tell her the story of his life, including the fact that he used methamphetamine and cocaine. Officer Burgess asked Slack if he remembered taking any drugs that morning before he got hurt. Slack answered, "I burned two nice rocks right before I walked out the door."

When Officer Coplan arrived at the hospital at 08:10 am, he learned that the medical staff had drawn blood earlier, but that Officer Burgess had not obtained a sample. Officer Coplan also discovered that medical staff had not yet taken a urine sample but planned to do so. Officer Coplan then requested a portion of both samples.

Officer Mulleneaux, a Drug Recognition Expert (DRE), was requested to evaluate Slack for drug use. Officer Mulleneaux responded and conducted an evaluation. Officer Mulleneaux talked with Slack at approximately 10:35 am, and observed that Slack's eyes were watery and bloodshot. When asked when he had last used drugs and what type of drug, Slack stated that he had smoked about \$20.00 worth of rock cocaine at 5:00 am while walking down the street on Glendale Avenue. Slack then told Officer Mulleneaux of his drug history. Slack explained that cocaine caused him to walk in a daze, gave him an intense mental rush, and that he experienced paranoia and "illusions." Slack said that consuming alcohol could sometimes alleviate the edge.

## **STATEMENT OF LAW**

The defendant Slack claims that the DRE report and testimony of Officer Mulleneaux are irrelevant because he is not charged with a substance abuse violation. The defendant is charged with one count each of second degree murder, aggravated assault, theft, and leaving the scene of an accident. The State maintains that the testimony and DRE report is relevant to show the defendant's culpable mental state at the time he stole the vehicle, collided with the victim's vehicle, and left the scene.

A.R.S. § 13-1104(A)(3) provides:

§ 13-1104. Second degree murder; classification

A. A person commits second degree murder if without premeditation:

3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person.

Whether a defendant's conduct manifests "extreme indifference to human life" is determined from all of the facts and circumstances surrounding his conduct. *State v Woodall*, 155 Ariz. 1, 744 P.2d 732 (App. 1987). In *Woodall*, family members had warned the defendant that he was impaired and probably would have an accident if he drove. The defendant had a prior DUI conviction. A friend at the bar had offered the defendant a ride, but the defendant refused. He was driving at a high rate of speed on a double curve requiring reduced speed, crossed over the center line on two occasions, narrowly missed one vehicle before being involved in the fatal collision, then collided with a second vehicle. The defendant did not assist the victims of either vehicle, left the scene, and had a breath test reading three times the threshold. The Court of Appeals

held that under all the circumstances, the jury was justified in finding that the defendant's conduct showed "extreme indifference."

In the instant case, Slack stole a truck, struck the pursuing owner's vehicle twice, drove in circles with the pursuing owner, drove at a high rate of speed, swerved from the curb lane to the center lane, was involved in a fatal collision, and fled the scene. At the hospital, Slack told Officer Mulleneaux that he had used cocaine only one hour before he stole the truck and that cocaine made him "walk in a daze," "gave him an intense mental rush," and made him "experience paranoia and illusions."

Intoxication alone has been considered a significant, if not controlling, factor for a murder conviction in many vehicular homicide cases. *Woodall, id.* The DRE report is extremely relevant and should be admitted into evidence, subject to properly laid foundation, to corroborate the second degree murder requirement of "extreme indifference to human life." Officer Mulleneaux, as a certified Drug Recognition Expert, should be permitted to testify as to the signs and symptoms of impairment that he observed in the defendant that day, and should be able to render opinions about the defendant's condition. *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).

Witnesses observed Slack's conduct at the scene. More importantly, Officers Burgess and Mulleneaux observed Slack's conduct at the hospital. The officers' observations are sufficient, and most certainly relevant, to submit to the jury to show Slack's mental state.

## **CONCLUSION**

The defendant failed to file his pleading in a timely manner, failed to comply with the Rules of Criminal Procedure, and has failed to support his allegations. Therefore, the State respectfully requests this Court to deny the defendant's Motion to Suppress.